71-311

SUPREME COURT, U.S.

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1971
No. .....

RUDOLPH NETSKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorrari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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Petition for a Writ of Certiorrari to the United States Court of Appeals for the Ninth Circuit.

The Petitioner Rudolph Netski respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 3, 1971.

Opinions Below.

The opinion of the Court of Appeals, not yet reported, appears annexed hereto. No opinion was rendered by the District Court for the District of Nevada.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 3, 1971. This petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

The proof necessary to establish violation of 26 U.S.C. §4705(g) when there was no proof of criminal intent in ordering the narcotic drugs, but an accountability inventory showed a narcotic drug shortage and there was no proof that the Defendant-Appellant disposed of the drugs in other than in the normal course of business.

Statutory Provisions Involved.

United States Code, Title 26:

§4705 Ordering narcotic drugs with unlawful intent.

(a) General requirement. It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary of his delegate.

(g) Unlawful use. It shall be unlawful for any person to obtain by means of said order forms narcotic drugs for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

United States Code, Title 18:

§371 Conspiracy to committ offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

United States Code, Title 28:

§1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;. . ..

United States Code, Title 28:

§1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code, Title 28:

§1294. Circuits in which decisions reviewable.

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district; . . .

Statement of the Case.

The Petitioner, a resident of Las Vegas, Nevada, was a licensed pharmacist and owned a drug store. An agent from the Bureau of Narcotics and Dangerous

Drugs made a compliance inspection of Petitioner's drug records. The inspection showed over 10,500 tablets of narcotic drugs could not be accounted for either by inventory or by prescription records. The evidence showed that Petitioner had placed orders on the official order form for a substantial quantity of dilaudid and dolophine tablets and minor quantities of codeine and morphine tablets.

The agent assuming a zero balance for narcotic tablets on January 1, 1969, totaled the narcotic tablets from the official order form, deducted those tablets accounted for by prescriptions and by inventory and arriving at a shortage in excess of 10,500 tablets. The government offered no proof that Petitioner, after ordering the narcotic tablets on the official form, unlawfully disposed of the tablets or used the tablets other than in his legitimate trade or business as a pharmacist. The government's proof showed that Petitioner ordered the narcotic tablets, received the narcotic tablets at his drug store and when called upon, was unable to account for the tablets by inventory or by prescriptions.

The Petitioner offered proof that he was the victim of forged prescription blanks, that a large quantity of prescription blanks (both for narcotic and non-narcotic drugs) were missing and presumably stolen and that he was victimized.

The Petitioner was prosecuted for violating Title 26, United States Code, Sec. 4705(g). The Petitioner requested the trial court to instruct the jury before it could find him guilty of violating the proscribed section that

> "The Government must prove beyond a reasonable doubt that the Defendant, after obtaining

narcotic drugs by a written order form, used the narcotic drugs for any purpose other than in his lawful business or the legitimate practice of his pharmaceutical profession."

The proffered instruction was refused by the trial court.

Reason for Granting the Writ.

There are now two appellate court decisions construing Title 26, United States Code, Section 4705 (g). The Petitioner's decision in the Ninth Circuit Court of Appeals and the Second Circuit decision in *United States v. Hymowitz,* 196 F. 2d 819 (1952) which construed Section 2554(g) of the Internal Revenue Code of 1939 which is now Section 4705(g).

The legislative history is silent concerning the proscribed activity that Congress had in mind when it enacted this section. The decision of the Second Circuit and the Ninth Circuit are not in conflict. Both decisions declared the statute violated when an order is placed for narcotic tablets with the requisite intent. That nothing further need be shown to violate the statute. The statute contradiction is apparent. The Petitioner, a pharmacist, placed an order for narcotic tablets, a lawful act. The narcotic tablets in due time were delivered to his pharmacy, still a lawful act. Petitioner's records were audited and he was unable to account for a large quantity of narcotic tablets. Mere unaccountability is still a lawful act.

The totality of the government's proof failed to show illegal activity on the part of the Petitioner. To cure this contradiction, the Petitioner proposed an instruction that would require the government to prove that he in fact sold, bartered, exchanged, or gave away the narcotic tablets in other than his lawful business.

Both the Ninth and Second Circuits held that this use is not an element of the offense created by Title 26, United States Code, Section 4705(g). The importance of the question should be considered in the light of the tens of thousands of druggists in this country, the numerous compliance investigations and whether mere unaccountability violates Title 26, United States Code, Section 4705(g).

Conclusion.

For this reason, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

RAYMOND E. SUTTON,
Counsel for Petitioner.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

United States of America, *Appellee*, vs. Rudolph Netski, *Appellant*. No. 71-1479.

|August 3, 1971|

Appeal From the United States District Court for the District of Nevada.

Before: DUNIWAY, HUFSTEDLER, and WRIGHT, Circuit Judges

PER CURIAM:

Netski appeals from his conviction for violating 26 U.S.C. §4705(g) (ordering narcotic drugs with unlawful intent.[1] He makes three contentions: (1) The evidence was insufficient to sustain his conviction; (2) the district court erred in rejecting his requested jury instruction; and (3) section 4705(g) is unconstitutional.

Netski, a licensed pharmacist, owned a drug store. He ordered very large quantities of narcotic drugs, using official order forms. When an agent made a com-

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[1]The pertinent code section provides:

26 U.S.C. § 4705 "(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

". . . .

"(g) Unlawful use.—It shall be unlawful for any person to obtain by means of said order forms narcotic drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

pliance inspection of Netski's drug records, over 10,500 tablets of narcotic drugs could not be accounted for either by inventory or by prescription records. About a month after the audit, Netski surrendered 1500 dilaudid tablets and 1000 morphine tablets to the agent, explaining that he had found them in the store. He placed orders for substantial quantities of dilaudid and dolophine tablets before he had made any sales of those drugs. There was evidence from which the jury could have found that Netski falsified two pages in his records to create fictitious prescriptions in order to account for the missing drugs.

Netski argues that the evidence was insufficient to prove that at the time he ordered the drugs he intended to dispose of them other than in the conduct of his lawful business. The fact alone that a druggist has a large quantity of drugs unaccounted for does not prove the requisite intent. But the evidence in this case went far beyond the proof of a shortage. We think the jury was entitled to infer from the conduct outlined above that Netski harbored the requisite illegal intent when he ordered the drugs.

Next, he says that the court prevented him from presenting his theory of the case to the jury when it denied his request to instruct the jury that "The Government must prove beyond a reasonable doubt that the defendant, after obtaining narcotic drugs by a written order form, used the narcotic drugs for any purpose other than in his lawful business or in the legitimate practice of his pharmaceutical profession." The court properly rejected the instruction. Use of the drugs other than in the course of his lawful business is not an element of the offense created by 26 U.S.C. §4705(g).

(*United States v. Hymowitz* (2d Cir. 1952) 196 F.2d 819.)

Finally, Netski contends that section 4705(g) is void for vagueness. The statute defines the crime in easily comprehensible terms. Men of common intelligence are not required to guess at its meaning. The statute does not punish one for nonaction. It penalizes one who orders narcotic drugs with the intent to sell or otherwise dispose of them illegitimately.

The judgment is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

RUDOLPH NETSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Nevada, petitioner, a licensed pharmacist, was convicted of having ordered large quantities of narcotic drugs pursuant to official order forms for purposes "other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession," in violation of 26 U.S.C. (1964 ed.) 4705(g). The court of appeals affirmed *per curiam* (Pet. App.).

Petitioner contends, as he did in the courts below, that the trial judge erred in denying his requested jury instruction that the government must prove beyond a reasonable doubt that, after ordering the narcotic drugs, he in fact used them in an illegitimate manner. As the court of appeals held, however, the statute does not punish the unlawful use of the drugs but rather the act of ordering them with intent to use them for a prohibited purpose. Thus, the instruction was properly refused. See *United States* v. *Hymowitz*, 196 F.2d 819, 821 (C.A. 2). There was ample evidence of petitioner's illicit intent when he ordered the drugs, as the court of appeals held (Pet. App. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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